



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.67 OF 2013**

*(Before D.K.N. Marete)*

**GEORGE MUSYOKI.....CLAIMANT**

Versus

**SAROVA HOTELS.....RESPONDENT**

**RULING**

By an originating summons dated 18th January, 2013 this application was brought to court. The applicant sought orders that:

1. **THAT** *this Honourable Court be pleased to grant the applicant leave to file suit out of time against the respondents.*
2. **THAT**, *the annexed draft memorandum of claim be deemed as duly filed after payment of requisite court fees.*
3. **THAT** *the costs of this application be in the cause.*

The application was supported by the affidavit of George Musyoki and also based on the following grounds;

- a. *The claimant suit against the Respondent is for compensation for terminal benefits as enumerated in the termination letter dated 22nd January, 2004.*
- b. *The claimant/applicant has been having frequent follow ups and conversation with one Mr. Omondi the Lodges Accountants since his termination and has been promised payments which to date have not been fulfilled.*
- c. *That the delay in filing this suit was evidently due to circumstances beyond the applicant and there has not been inordinate delay.*
- d. *That the claimant/applicant is desirous of pursuing the claim and thus doors of justice should not be closed to him at this opportune time.*

- e. *That the claimant/applicant will suffer irreparable damage if the orders sought are not granted.*

The matter came for hearing on 13th March, 2013 whereupon counsel for the applicant, one, Gichuki canvassed the claimant/applicant's case in support of the application.

The applicant seeks leave to file a claim for terminal benefits in which the termination was effected on 22nd January, 2004. The applicant upon termination was charged and prosecuted in court at the Principal Magistrate's court, Isiolo, Criminal Case No. 615 of 2004 and acquitted on 17th November, 2005.

The applicant who had a termination letter detailing his termination dues thereupon proceeded to pursue these termination dues through the respondents Accountant, a Mr. Omondi who repeatedly has been promising payments to no avail. He argues and submits that the reasons for the delay in payment were beyond the claimant's control and therefore this recourse for orders as sought. The applicant in support of his application attached a termination letter – exhibit GM1 in support of this application.

The singular issue for determination is whether in the circumstances of the case, leave should or should not issue for filing the matter out of time.

This action is brought under Order 37 rule 6(1) of the Civil Procedure Rules and Section 22, 27 and 28 of the Limitations of Actions Act, Chapter 22, Laws of Kenya.

Whereas Order 37 rule 6(1) is the enabling section and sets out the procedure for an application of this nature, the provisions of the Limitation of Actions Act stipulate the law relating to the conditions for such applications. Section 28 supplements Order 37 rule, 6(1) on the procedural aspects of the application.

Section 22 of the Limitation of Actions Act provides for extension of limitation period in cases of disability. It provides that an extension of limitation is available before the end of six years from the date the person ceases to be under a disability or dies, whichever is the earlier. Disability in the circumstances would take a technical meaning as defined under section 2(b) of the Act and be construed as being minor or unsoundness of mind that would disable a person from filing suit within the time line of the liability period and extends to death.

The applicant in his submissions or even pleadings does not in any event demonstrate a case of disability to justify the application of this law to his case. The only likeness, I guess is the submission of the prosecution of the applicant in criminal case No. 615/2004, Principal Magistrate Isiolo which was concluded on 17th November, 2005. The applicant, however, does not come out to link this with the principle of disability, or at all.

Section 27 of the Act relates to extension of limitation period in cases of ignorance of material facts in actions of negligence *et al.* Negligence is in realm of the law of tort. It does not relate whatsoever with the current situation of employment law and or contract. To purport to bring out this action under Section 27 therefore is not totally sustainable.

The subject matter herein is contractual in nature and therefore the limitation period is six years. Section 4(1) of the Limitation of Actions Act refers.

Extension of time under the Limitation of Actions Act can be had if there is compliance with the requirements of part III of the Act as follows:-

- a. *Disability - section 22*
- b. *Acknowledgement and Part Payment – Section 25*
- c. *Fraud and mistake – section 26.*

d. *Ignorance of material facts in actions of negligence etc – Section 27*

The claimant/applicant adduces and submits onto the following grounds for delay;

1. *He has had frequent follow-ups and conversations with his previous employer since his termination.*
2. *Delay is due to circumstances beyond his control.*
3. *If he had known that the law of limitation would affect him, he would have filed the claim a long time ago.*

When the court is looking at the conditions of extension of time and juxtaposing these to the pleadings, it shall be guided by the provisions of section 28 of the Limitation of Actions Act which provides as follows;

*Section 28(1) .....*

*Section 28(2)*

*Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient-*

*(a) to establish that cause of action, apart from any defence under section 4(2); and*

*(b) to fulfill the requirements of section 27(2) in relation to that cause of action.*

Further,

*Section 27(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which-*

- a. *either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and*

*(b) in either case, was a date not earlier than one year before the date on which the action was brought.*

He pleads;

- i. *That the delay in filing this suit was evidently due to circumstances beyond the applicant and there has not been inordinate delay.*
- ii. *That the claimant/applicant is desirous of pursuing the claim and thus doors of justice should not be closed to him at this opportune time.*
- iii. *That the claimant/applicant will suffer irreparable damage if the orders sought are not granted.*

In this case, all the material and disclosed facts of this claim were within the knowledge of the applicant and he has no grounds for not taking action well over nine years down the line. Section 27 (2) is a legal requirement from which the claimant/applicant cannot be exempted. This was the finding of Visram J. in

case of **Nancy Njeri Njuguna Vs Peter Opumbi and Attorney-General, Civil Cause No. 229 of 2001 (OS)**.

*Before the court can allow a plaintiff to bring a claim founded on tort outside the period of limitation, section 28 of Cap 22 requires that the applicant must, inter alia, fulfill the requirements of section 27(2) in relation to the cause of action. In this respect, it is the responsibility of an applicant to show that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which;-*

- a. *either was after the three year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and*
- b. *in either case, was a date not earlier than one year before the date on which the action was brought.*

The Limitation of Actions Act and the Employment Act make a point of conveyance under Section 31 of the Limitation Actions Act which provides that part III shall apply to other laws of limitations..

*S.31 Where a period of limitation is prescribed for any action or arbitration by any other written law, that written law shall be construed as if Part III were incorporated in it.*

This means that the court is enabled to look at the conditions set out under part III of the Limitation Actions Act and offer extension of time as aforesaid.

This was enunciated in the authority of **Nancy Njeri Njuguna Vs. Peter Opumbu & Attorney-General**, abovecited.

The requirement of Section 27(2) is the knowledge of the applicant and not any other outlying factors. In the instant case, as was in Nancy Njeri Njuguna aforesaid the applicant was endorsed with the knowledge of the facts since 22nd January, 2004 when he was issued with a letter of termination. The applicant therefore has not fulfilled the requirements of Section 27(2) and therefore this actions would of necessity fail.

In the case of **Lucia Wambui Ngugi vs Kenya Railways and another**, Mbitio J. expressed the law on granting of leave out of time under the Limitation of Actions Act.

*“When an application is made for leave under the Limitation Act, a judge in chambers should not grant leave as of course. He should carefully scrutinize the case to see whether it is a proper one for leave. Since it has been decided that the defendants have no right to go back to the High court to challenge such orders, it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinized, and, if that evidence does not make (it) quite clear that the plaintiff comes within the terms of the Limitations Act, then either the order ought to be refused or the plaintiff ought perhaps to be given an opportunity of supplementing his evidence. It must, of course be assumed for the purposes of the ex parte application that the affidavit evidence is true; but it is only if that evidence makes it absolutely plain that the plaintiff is entitled to leave that the application should be granted and the order made, for, such an order may have the effect of depriving the defendant of a very valuable statutory right. It is not in every case in which leave has been given ex parte on inadequate evidence that the defendant will be able to mitigate the injustice which may have to be done (to) him by obtaining an order for the trial of a preliminary issue... section 27 of the Limitation of Actions Act... provides that limitation period under section 4(2) of the said Act can be extended in certain circumstances and by the provisions of section 31 of the said Act, all limitation periods prescribed by any other written law is extendable by the provisions of section 27 of the said Act. Consequently this*

*application can only succeed if the applicant can avail herself of the provisions of section 27 of the Act as read with section 31 thereof, which enact that the limiting provision shall not afford a defence to an action founded on tort where the court gives leave on account of the appellant's ignorance of material facts relating to the cause of action which were of decisive character... Although what amounts to "ignorance of material facts of decisive character" is not always easy to distinguish, by section 30(1) of the Limitation of Actions Act when read with subsection (2) thereof, material facts of decisive character are said to be those relating to a cause of action which would enable a reasonable person to conclude that he had a reasonable chance of succeeding and getting damages of such amount as would justify the bringing of the action"*

*Even in cases where the claim falls under the aforesaid provisions time will not be extended unless the applicant proves that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge(actual or constructive) of the plaintiff. In order to prove this, the applicant is expected to show that he did not know that fact; that in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and that in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances. In section 30(5) "appropriate advice" is defined as meaning in relation to any facts or circumstances "advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be"*

*The third conditions that leave must then have been sought and obtained. This is the stage at which we are presently. The last requirement is the fulfillment of the provisions of subsection (2) of section 27 of the said Act. Under this subsection the applicant is expected to prove that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the applicant's knowledge and that he became aware of these facts after the limitation period of within one year before the expiry of the limitation period. In either case, the action must be brought within one year of such discovery.*

In the instant case, the basic ground for delay is that the claimant/applicant has been having frequent follow ups and conversations with an officer of the employer, one, Mr. Omondi, an accountant since his termination and has been promised payment which todate has not been made. Further, he avers that the delay in filing this suit is due to circumstances beyond the applicant and there has not been inordinate delay. These facts are reiterated in the supporting affidavit to the originating summons where he further avers that the doors of justice should not be closed on him.

In **Gathoni Vs Kenya Co-operative Creameries Ltd Civil Application No. 122 of 1981**, Potter JJA, observed in obiter that;

*"The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest"*

It is also an established principle that leave to file suit out of time must be in exceptional circumstances and not as of course. This is because this would deprive defendants in suits of the well deserved enjoyments of statutory protection of their rights in litigation.

Would it therefore be reasonable to exercise the discretion and appearing of the law in favour of the applicant/claimant in the circumstances and grant the orders sought? The application on the onset is scanty. The only issue relevant is brought out by Section 27(1) which foments a case of extension of

limitation period in case of ignorance of material facts in actions for negligence *et al*( LN 228/1973). This brings the fore of the present action as it is based on breach of duty arising out of breach of contract and therefore the fitting acceptance of this action as rightly placed before court.

It would follow that under all circumstances, extension of time would pursue the provisions of section 27 and or tort issue of breach of duty which duty extends to duty under a contract or written law - or independently of a contract or written law. The correct situation falls within the orbit of contract and is therefore relevant.

The other basis for issue of extension out of time is that the applicant was not within the knowledge of material facts relating to the issues in dispute (actually on constructively) until the expiry of the period of limitation.

This cause does not meet the requirement of section 27(2) either. At all times in the course of the nine year lapse between the period of termination in 2004 to date, this course which was not within the knowledge of the claimant/applicant. He had been issued with a generous letter of termination dated 22nd January, 2004 clearly spelling out his termination dues. That he did not pursue these effectively for eleven years, he has only himself to blame.

The other test for granting leave in the circumstances of this case is the test in Section 27(2) of the Act. The issue herein is whether the evidence adduced in and on behalf of the plaintiff convincingly establishes this course of action or satisfies section 27(2) of the Act in relation to the compelling evidence which would on the face of it propel one to find in the applicant's favour and these should not have been in the purview of the claimant/applicant in the circumstances. Both of these circumstances are evidently absent under these circumstances and therefore this course must fail.

I would, however, bring in two situations to counter a case against grant of extension of time. Firstly, the claimant/applicant tenders grounds for inability to file the matter within the limitation period. After release and acquittal in the criminal proceedings against himself, he undertook a course of negotiation with the respondent's accountant and was always assured of payment of his dues endlessly. This was not to be. This would agree and mitigate the issue of limitation as provided by the law. Again, I am reminded of and buy the feelings and jurisprudence of my brother Rika, J. that matters of employment and labour relations would be best determined by a liberal and broad interpretation of the law. Any conservative approach would frustrate the interplay of employment and labour relationships. He commend that these matters should where necessary be determined on the social circumstances of the case. This would facilitate a case for justice like in the instant case. He observes as follows in the authority of **Stephen Njoroge Kigochi vs. Dr. Martin Njoroge Wanyoike & Primecare Heart Clinic Ltd, Industrial Court Cause No. 1355 of 2012.**

*17. This court has in past held that it would be difficult for employees to enforce their employment rights, if the court was to give a conservative interpretation to the idea of legal separateness. The doctrine of corporate separateness as popularized in the case of Salomon vs Salomon & Co. Ltd (1897), Ac 22, needs to be cautiously interpreted within modern and employment relationships. As observed in the industrial Court Cause No. 2038 of 2011 between Agnes Ogutu v. Ms Fun An Shop Limited & Manjunath Prabhu, (UR), the doctrine of legal separateness has limitations where contracts of employment are in issue. The court looks at the economic enterprise, the totality of the business structure, rather than the personality assumed by the employer. Employees are recruited by known human persons, [in the present case Dr. Wanyoike] and will hardly know the insulating, multiple legal personalities at the bottom of the employers business. Employee should therefore be given the greatest latitude in bringing all entities described under section 2 above to account for employment wrongs.*

Employment and labour relations matters and disputes must always be awarded human face. Stringent application of the law may not necessarily bring out justice in the circumstances. It would always necessary to bridge these situations to come out with a case for justice. This is the case here.

I would in the circumstances allow the application with no order as to costs.

**Delivered, dated and signed this 5<sup>th</sup> day of December, 2014**

**D.K.Njagi Marete**

**JUDGE**

Appearances

Gichuki instructed by B.M. Mung'ata and company advocates for the claimant/applicant